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October 1, 2001

Mr. Jeff Keohane
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Dear Jeff:

I have enclosed for your review a copy of an amicus brief filed in 1993 by the State of Maine in a case before the first Circuit Court of Appeals (Brief Amicus Curiae of the Commonwealth of Massachusetts and the State of Maine and Nevada, State of Rhode Island et al. v. Narragansett Indian Tribe et al, 19 F.3d 685, (1st Cir 1994)) ((Brief).

The significance of this Brief is two fold. First, Maine argues in the Brief that the language of 25 U.S.C. 1725(a) of 1980 federal Maine Indian Claims Settlement Act (25 U.S.C. 1721 et. seq.) (MIA) grants exclusive jurisdiction and authority to Maine over the Houlton Band of Maliseet Indians (Maliseet or Tribe). As you are undoubtedly aware, the State of Maine is still taking the position that the language of the 1980 Maine Implementing Act grants Maine exclusive jurisdiction over the Maliseet Tribe.

In the Brief, Maine argues that the language of the MIA is similar to Rhode Island's Settlement Act with the Narragansett Indians and that both Settlements grant virtually exclusive jurisdiction over the respective Tribes that are party to these Settlements. It was with some interest that I read the contents of the Brief as the decision in that case responds directly to this argument. On March 23, 1994, the First Circuit held that that the language that Maine has relied upon, and continues to rely upon, to assert exclusive jurisdiction over the Maliseet, merely a grants concurrent jurisdiction, not exclusive jurisdiction to the State:

> . . . the mere fact that the Settlement Act cedes power to the State does not necessarily mean, as Rhode Island suggests, the Tribe lacks similar power and thus lacks' jurisdiction over the settlement lands. Although the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad . . . we do not believe that it is exclusive. To the contrary, we rule that the Tribe retains concurrent jurisdiction over the settlement lands.
> (State of Rhode Island et al. v. Narragansett Indian Tribe et al, 19 F.3rd 685 (1st Cir 1994)) (See Attached)

In light of the above holding by the Circuit Court, it appears that Maine has staked out a precarious position vis as vis the Maliseet. The Maliseet Tribe respectfully requests that the appropriate people in your office be made aware of this amicus brief and the subsequent opinion

of the First Circuit and that this information is reviewed prior to making any determination on the jurisdiction of the State of Maine over Maliseet trust lands.

Second, the Brief asserts that the MIA is a contract between the Maine Tribes and the State entered into for the purpose of settling on-going litigation. Moreover, the State argues that Congress is limited by the Constitution in acting in a manner that negates the terms of that contract. This argument directly supports the Maliseet contention that the MIA is a Tribal-State compact and Congressional ratification of that compact did not alter its terms:

> Like the Rhode Island settlement involved in this case, the Maine and Massachusetts settlements were negotiated and concluded between each State and tribe on a sovereign-to-sovereign basis. The settlements resolved contested litigation. (Brief Page 5)

> Whether these rules, or different rules grounded in the Tenth amendment, and the Constitution scheme, apply to a Congressionally approved compact between sovereign states and tribes appears to be unsettled. It is highly unlikely, however, that the Constitutional scheme tolerates unilateral federal abrogation of contracts between sovereign States and sovereign tribes. Congress is generally subject to limitations upon its power to curtail state authority, based upon the constitutionally recognized sovereignty of the states. (Footnotes omitted) (Brief Pages 20-21)

I look forward to discussing this matter with you further. If you have any questions regarding this letter, or other issues raised by the Tribe, please call me at 781 861-6535

Sincerely,

Douglas J. Luckerman
Counsel for the Houlton Band of Maliseet Indians

cc: Chief Brenda Commander

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 93-1400

STATE OF RHODE ISLAND, et al,

Plaintiffs-Appellees,

v.

NARRAGANSETT TRIBE OF INDIANS, et al,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF MAINE AND NEVADA

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STATEMENT OF THE ISSUES

The amici address the following issues:

1. Should the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2710-2721 and 18 U.S.C. §§1166-1168 ("IGRA") be construed in harmony with the Settlement Acts approved by Congress, affecting Maine and Massachusetts, as well as Rhode Island?

2. Does the District Court's ruling that IGRA preempts Rhode Island's Settlement Act unnecessarily raise issues under the Tenth and Eleventh Amendment to the U.S. Constitution, which could be avoided by a proper construction of the statutes in question?

STATEMENT OF INTEREST OF AMICI CURIAE

The amici curiae Commonwealth of Massachusetts and states of Maine and Nevada are sovereign states subject to the terms of IGRA. They have federally recognized Indian tribes within their borders and have received requests from these tribes to negotiate regarding proposed gaming operations by the tribes.

Congress has approved settlements between some of the amici and the tribes within their respective borders.[1/] In 1987, Congress approved the Massachusetts Indian Land Claims

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1/ All amici have a direct interest in the Tenth and Eleventh Amendment issues discussed in this brief.

regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws."(emphasis added)).

Similarly, the Maine Indian Claims Settlement was enacted in 1980, governing the relations between Maine and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. 25 U.S.C. §1721 et seq., Pub. L. 96-420, §4, 94 Stat. 1787 (Oct. 10, 1980). With some non-applicable exceptions (generally relating to certain child welfare, land transfer, condemnation and taxation matters), the Act provides:

> all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

With respect to the three tribes recognized and involved in the settlement, the Act provides:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified and confirmed.

25 U.S.C. § 1727(b)(1).

The Maine Implementing Act (30 M.R.S.A. §§ 6201 et seq.) provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State

> and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S.A. § 6204. The Maine Implementing Act further provides that with the exception of certain misdemeanors and juvenile crimes involving exclusively members of the Passamaquoddy Tribe or Penobscot Nation, "all laws of the State relating to criminal offenses and juvenile crimes shall apply within the Passamaquoddy and Penobscot Indian reservations and the State shall have exclusive jurisdiction over those offenses and crimes." 30 M.R.S.A. § 6209(1).

If affirmed and read broadly, the decision of the District Court in this case could impair the ability of the amici states to exercise jurisdiction over gaming activities that may have serious impacts upon the States' residents and environment. Massachusetts and Maine have outlawed or severely restricted casino gambling, because of the potential for commission or promotion of criminal activity. See, e.g., Mass. Gen. Laws, c. 271, §1 et seq.; 17 M.R.S.A. §332(3),(4). In addition, any casino in those states would likely have serious traffic and environmental effects, which would ordinarily be subject to state and local regulation. The amici submit this brief in support of the state of Rhode Island and Providence Plantations, because the District Court's rationale and holding are inconsistent with federal statutory and constitutional law.

STATEMENT OF THE CASE

The amici adopt Rhode Island's statement of the case.

ARGUMENT

The amici support the arguments made by Rhode Island in this case. This brief supplements Rhode Island's brief by concentrating on two additional points. First, the relationship between IGRA and the Massachusetts and Maine Acts provides additional support for Rhode Island's argument that IGRA did not implicitly repeal the confirmation (or grants) of state jurisdiction in Indian Settlement Acts passed by Congress. Second, the District Court's opinion violates the general rule that statutes should be construed to avoid constitutional questions--in this case, questions arising under the Tenth and Eleventh Amendments to the United States Constitution.

A. The Massachusetts and Maine Settlements Demonstrate that IGRA Did Not Preempt Specific Settlement Agreements That Preserved State Jurisdiction.

Like the Rhode Island settlement involved in this case, the Maine and Massachusetts settlements were negotiated and concluded between each State and tribe on a sovereign-to-sovereign basis. The settlements resolved contested litigation. The terms of the settlements differ from state to state, reflecting the different conditions and claims made within each state, as well as the circumstances prevailing and anticipated at the time the settlements were reached. Analysis of the terms and circumstances of these agreements

demonstrated that Congress did not, sub silentio, repeal these negotiated agreements.

Congressional approval of the Massachusetts settlement predated IGRA by only fourteen months. If carried to its logical conclusion, the District Court's decision in this case might be read to say that two Congressional acts, passed within barely a year of each other, are so inconsistent that they cannot both stand. Such a result would violate the principle that implied repeal is disfavored, as statutes should be read consistently with each other, if possible. See, e.g. Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986); United States v. Burns, 725 F.Supp. 116 (N.D.N.Y. 1989), aff'd sub nom. United States v. Cook, 922 F.2d 1026 (2d Cir.), cert. denied sub nom. Tarbell v. United States, 111 S.Ct. 2235 (1991)(IGRA does not preempt or repeal 18 U.S.C. § 1955, prohibiting operation of slot machines).

The Massachusetts and Maine settlements, like Rhode Island's, can be read consistently with IGRA. IGRA does not contain any language expressly repealing prior, specific legislation allocating jurisdiction over tribal lands between States and tribes. Nor does it confer new jurisdiction upon the tribes; it simply permits new uses of existing tribal jurisdiction. The express terms of IGRA take account of the pre-existing statutory limitations upon the jurisdiction of some tribes, which necessarily includes any prior withholding of tribal jurisdiction over gaming activities.

The statutory authorization in IGRA for certain tribes to permit class III gaming expressly recognizes such limitations:

> Class III gaming activities shall be lawful on Indian lands only if such activities are--
>
> (A) authorized by an ordinance or resolution that--
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands . . .

25 U.S.C. § 2710 (d)(1)(A)(emphasis added). Similarly, the ability to request negotiations over a Tribal-State compact regarding class III gaming is limited to tribes "having jurisdiction":

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities.

25 U.S.C. § 2710(d)(3)(A)(emphasis added). Thus, not all tribes have authority under IGRA to request negotiations for a tribal-state gaming contract, or to authorize class III gaming. Only those tribes "having jurisdiction over such lands" have that authority[3/]. By straightforward negative implication, the statute contemplates that some tribes will not have the

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3/ It is not necessary to read the word "jurisdiction" as though it were an all or nothing proposition. The settlement acts give Maine, Massachusetts and Rhode Island civil and criminal jurisdiction over the lands in all the significant respects for purposes of class III gaming.

requisite jurisdiction over tribal lands. And, indeed, the tribes within Massachusetts, Maine and Rhode Island do not.

The Massachusetts Act explicitly withholds authority from the tribe in precisely the same terms used by IGRA. The Massachusetts Act denies the tribe "any jurisdiction over any part of the settlement lands in contravention of . . . the civil regulatory and criminal laws of the Commonwealth of Massachusetts . . .." 25 U.S.C. § 1771e(a)(emphasis added).4/ The settlement lands are explicitly "subject to the . . . jurisdiction of the Commonwealth of Massachusetts", and this jurisdiction includes state "laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g (emphasis added).

By extending to laws that "regulate" gambling, the Massachusetts legislation expressly rejects the frequently-made distinction in Indian gaming cases between regulatory laws and prohibitory laws. See e.g., California v. Cabazon Band of

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4/ In a non-IGRA case involving Kansas' criminal jurisdiction, the Court read the first sentence of the Kansas Act, 18 U.S.C. § 3243 as "unambiguously confer[ring] jurisdiction on Kansas to prosecute all offenses--major and minor--committed by or against Indians on Indian reservations in accordance with state law" notwithstanding the exclusive federal jurisdiction provided by the Indian Major Crimes Act, 18 U.S.C. § 1153. Negonsott v. Samuels, 113 S.Ct. 1119, 1123 (1993). The Court expressly noted that its construction did "not work an 'implied repeal' of the Indian Major Crimes Act", because the federal courts retain exclusive federal jurisdiction to try federal crimes. Id.

Mission Indians, 480 U.S. 202 (1987); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir.), cert. denied, 455 U.S. 1020 (1982). Under the Massachusetts Settlement Act, both types of state laws apply to gaming on Indian lands. By the express terms of IGRA, then, no class III gaming could be authorized by the tribe, since the tribe lacks the requisite "jurisdiction over such lands". 25 U.S.C. § 2710(d)(1)(A).

Congress plainly intended to limit class III gaming under IGRA to only those tribes "having jurisdiction." To read IGRA as expansively as the District Court did would deprive this phrase of meaning, in contravention of established principles of construction.5/ Even if there were any doubt, then this phrase in IGRA would have to be interpreted in harmony with language of the Massachusetts Act, adopted a year earlier. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984); Watt v. Alaska, 451

5/ The cases upon which the District Court relied are distinguishable, because they did not involve the question whether IGRA repealed prior congressional grants of State jurisdiction. The cases involved actual or threatened criminal prosecutions, and the States in question had no specific federal statutory jurisdiction over the Indian lands. United Keetowah Band of Cherokee Indians v. State of Oklahoma ex rel. Moss, 927 F.2d 1170 (10th Cir. 1991)("This is not a case . . . wherein Congress specifically delegated jurisdiction to the State."); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F.Supp 645, 652 (W.D. Wis. 1990)(Under 18 U.S.C. § 1162 and 28 U.S.C. § 1360 ("Public Law 280") "the state has no jurisdiction"); Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498, 1503 (S.D. Cal. 1992)("the defendants lacked authority under" Public Law 280).

U.S. 259, 266-67 (1981). Moreover, the very specific provisions of the Massachusetts Act expressly relating to gaming would prevail over the general provisions of IGRA, despite IGRA's subsequent enactment, since IGRA contains no clear contrary statement. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987)("As always, '"[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."'"(emphasis by the Court; citations omitted)). To rule otherwise would violate the rule that effect must be given "to every clause and word of [the] statute" conferring jurisdiction on Massachusetts. See Negonsott, supra, 113 S.Ct. at 1123 (citation omitted).

Maine's situation is similar. In the Maine Indian Claims Settlement Act, Congress, as in the case of Massachusetts and Rhode Island Indians, expressly provided that "[t]he Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act...". 25 U.S.C. § 1725(b)(1) (emphasis added). The Maine Implementing Act states:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other

> person or entity shall be subject to the laws of the State and to the civil and criminal jurisdication of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S.A. § 6204 (emphasis added). The only exceptions in the Act to the State's civil and criminal jurisdiction are limited to certain misdemeanors, juvenile crimes, and civil actions involving exclusively members of the Passamaquoddy Tribe or Penobscot Nation, "Indian child custody proceedings," and "[o]ther domestic relations matters including marriage, divorce and support between members of either tribe or nation both of whom reside on the Indian reservation of the respective tribe or nation." 30 M.R.S.A. § 6209(1). The Maine Implementing Act further provides that the Passamaquoddy Tribe and the Penobscot Nation "shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State...". 30 M.R.S.A. § 6206(1) (emphasis added).

Hence, by the express terms of IGRA, no class III gaming can be authorized by Maine Indians under the auspices of IGRA, since Maine Indians lack the requisite "jurisdiction over such lands." 25 U.S.C. § 2710 (d)(1)(A). See Penobscot Nation v. Stilphen, 461 A.2d 478, 488 n.7 (Me.) app. dism., 464 U.S. 923 (1983):

> The Penobscot Nation's counsel acknowledged that the expansion of the State's jurisdiction over the Maine Indian tribes from what he conceived it previously to be was part of the quid pro quo for the State's going along with the settlement, which was necessary for the nation to get the

monetary benefits provided it by the settlement. He said: "In light of all this, one might ask why the Indians were willing to even discuss the question of jurisdiction with the State but simply the answer is that they were obliged to do so if they wanted to effectuate the Settlement of the monetary and land aspects of the claim.... [T]he Tribes opened negotiation with the State concerning the question of jurisdiction not because they wanted to do so but because they were obliged to do so to obtain a settlement that they and already negotiated with the federal government." Transcript of March 28, 1980 Public Hearing before the Joint Select Committee on Indian Land Claims, 23-24 (1980).

The conclusion that Maine Indians lack the requisite jurisdiction over Maine Indian lands for purposes of IGRA is further supported by the following provisions in the Maine Indian Claims Settlement Act wherein Congress expressly recognized the State's jurisdiction over Indian tribes and lands within Maine:

> Except as otherwise provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the Unites States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. § 1725(h) (emphasis added).

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the

> Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735(b) (emphasis added).

Although IGRA's language makes IGRA generally applicable to "Indian tribes" (25 U.S.C. § 2703(5)) throughout the United States, this language does not satisfy the "specifically applicable" requirement of Section 1735(b) so as to preempt the application of Maine law. For not only is there no provision in IGRA that makes IGRA specifically applicable within the State of Maine, but also IGRA does not confer upon Maine Indians the jurisdiction mandated by 25 U.S.C. § 2710(d)(1)(A)(i) to conduct class III gaming--the very jurisdiction that Maine Indians lack under the express terms of the Maine Indian Claims Settlement Act and the Maine Implementing Act. To read IGRA as conferring such jurisdiction, and as thus preempting Maine gaming law, not only is unwarranted by the plain language of IGRA but also would constitute an implied repeal of the "specifically applicable" requirement and the allocation of jurisdiction set forth in the Maine Indian Claims Settlement Act--a disfavored method of statutory construction. See, e.g., Loftsgaarden, supra, 478 U.S. at 661.

In short, IGRA can and should be read as respecting existing limits upon tribal jurisdiction recognized in various prior Acts of Congress. Legislative history confirms the correctness of such an approach:

> . . . it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act (Act of September 30, 1978, 92 Stat. 813; P.L. 95-395) and the [Maine] Indian Claims Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96-420).

S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3082.6/

If the statutes affecting Massachusetts and Maine can be read consistently with IGRA, there is no reason why Rhode Island's should be read differently. See 25 U.S.C. §1708 ("the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island" (emphasis added)). As long as such a consistent reading is possible, it must be adopted under standard principles of statutory construction. Only such a construction can preserve the negotiated and Congressionally approved settlements between the tribes and the States.

6/ The District Court (slip op. at 16, citing 134 Cong. Rec. S12649 (daily ed. Sept. 15, 1988)), noted that the original section 23 of S. 555 was deleted before IGRA was passed. But "Congress' decision to delete the specific reference to the effect of the" Rhode Island Act on IGRA "is too slender a reed upon which to rest departure from the clear import of the text of" the Maine, Massachusetts and Rhode Island Acts. See Negonsott, supra, 113 S.Ct. at 1125. In any event, the deletion of section 23 was requested because the section was superfluous. Slip op. at 15, quoting 134 Cong. Rec. S12650 (daily ed. Sept. 15, 1988).

B. In Order To Avoid Serious Constitutional Questions, IGRA Must Be Read To Exempt Maine, Massachusetts And Rhode Island From Mandatory Good Faith Negotiations Over Indian Gaming.

The District Court's construction also violates the principle that statutes must be construed to avoid constitutional questions. See, e.g. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936)(Brandeis, J., concurring). Only a holding that Rhode Island is under no statutory obligation to negotiate would avoid the necessity for a decision--in this case or subsequent cases[7/]--whether IGRA is constitutionally infirm under the Tenth and Eleventh Amendment as interpreted in cases such as New York v. United States, 112 S.Ct. 2408 (1992)(Tenth Amendment) and Blatchford v. Native Village of Noatak, 111 S.Ct. 2578 (1991)(Eleventh Amendment).

1. Compelling the States To Negotiate Raises Serious Tenth Amendment Issues.

As construed by the District Court, IGRA has divested the States of jurisdiction that was negotiated, agreed to and confirmed in an agreement between the States and tribes on a

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7/ While Rhode Island did not raise the 10th and 11th Amendment issues below, the statutory construction question involved here cannot be decided without considering the relevance of the constitutional provisions protecting the States from federal legislation. Moreover, the constitutional questions are likely to arise in subsequent cases, possibly involving the amici.

sovereign-to-sovereign basis. In place of the States' jurisdiction, IGRA has ostensibly required the States to choose between federal mandates: either "the State shall negotiate with the Indian tribe", 25 U.S.C. § 2710(d)(3)(A) or it is subject to suit in the federal courts, with a very real prospect of court-ordered negotiations and mediation. 25 U.S.C. § 2710(d)(7)(A),(B). To force the States to this choice would violate the Tenth Amendment to the Constitution, particularly where the involuntary imposition of this choice eliminates the States' jurisdiction over the lands in question previously ratified and conferred by Congress.[8/] See Ponca Tribe of Oklahoma v. State of Oklahoma, No. 92-988-T, slip op. at 9-11 (W.D. Okla. Sept. 8, 1992), appeal pending (10th Cir.)(Tenth Amendment bars IGRA provisions compelling the State to negotiate in good faith over Indian gaming); Pueblo of Sandia v. State of New Mexico, No. 92-0613-JC, slip op. at 3 (D. New Mex. 1992), appeal pending, 10th Cir. No. 93-2018 (same).

The leading, recent Tenth Amendment case is New York v. United States, 112 S.Ct 2408 (1992). There, the Supreme Court struck down the so-called "take title" provision of the Low

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8/ Some aspects of the Tenth Amendment issue concern IGRA's negotiation provisions generally, but the question of Congress' ability to change settlement terms retroactively and unilaterally would arise only in states like Rhode Island, Massachusetts and Maine, where special settlement legislation applies.

Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021e(d)(2)(C). The take-title provision required that, if a State failed to have a disposal site constructed by the statutory deadline, then the State would take title to all low level radioactive waste generated within its boundaries. The Court held that the Constitution protects the States against "federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." Id., 112 S.Ct at 2428.

The defect in the Radioactive Waste statute was in the means chosen--commandeering of the state governmental process--rather than in the goal of the legislation; the Court readily acknowledged that Congress has authority to regulate disposal of hazardous waste:

> [W]hether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id., 112 S.Ct. at 2429.

If IGRA's forced negotiation provisions were construed to apply to the Rhode Island, Maine and Massachusetts lands, then they would violate these principles. They coerce the States to become involved involuntarily in administering a federal program either through compliance with the mandate of "good faith negotiations" or through Court orders, mandated negotiation and mediation. The federal court in an IGRA case would examine the good faith of high state officials performing discretionary functions relating to permitting gambling activities within the state's borders. If the Court finds bad faith, it is to issue orders requiring the States to make good faith offers--which may be accepted and create binding obligations--even if the responsible State officials believe that no offer to approve class III gaming should be made, consistent with general state policy against particular types of gambling. This scheme commandeers the machinery of state government for federal purposes.

Not only would this violate the States' sovereignty, but it would also distort the accountability of Congress to the electorate, in contravention of the constitutional plan. Whatever authority Congress has to authorize and regulate gaming on Indian lands, it has no authority to conscript the States to make the politically sensitive choices over negotiations and the content of state-tribal compacts, thereby displacing any blame or political consequences from Congress to the States. Cf. New

York, supra, 112 S.Ct at 2424 (Where "Congress merely encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

The fact that Rhode Island, Maine and Massachusetts had undisputable--and Congressionally ratified--regulatory authority over the lands in question prior to IGRA compounds the constitutional infirmity in this case. If IGRA truly overrides state jurisdiction, then Congress has asserted a power to prejudice the rights of the States retroactively by altering unilaterally the terms of a settlement agreement that it has previously approved, and which was carefully negotiated between the sovereign States and the sovereign tribes. It has asserted this power notwithstanding the provision of consideration for the agreement by Massachusetts, in the form of the authorization to convey local public lands to the tribe. See 25 U.S.C. §1771c(a)(1)(A); 1985 Mass. St. c. 277, § 3. Any suggestion that Congress may do so must take account not only of the States' sovereignty, embodied in the constitutional scheme, but also of the general constitutional principles limiting the federal government's ability to impair agreements.

For instance, Congress may not back out of agreements that it makes with private parties. While Congress is not strictly bound by the Contract Clause, there are Fifth Amendment limitations upon its ability to impair contracts. See Lynch v.

United States, 292 U.S. 571 (1934)(invalidating congressional attempt to cancel government war risk life insurance). Tribe, American Constitutional Law, (2d Ed. 1988), p. 613, n.1. But see Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984)(stating that the "standards imposed on economic legislation by the Due Process Clauses" are "less searching than those imposed on States by the contract clause"). Cf. United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) (Contract clause prohibited interstate authority from abrogating its contractual obligations).

Similarly, Congress may not unilaterally abrogate a treaty with an Indian tribe, or amend "or repeal a statute guaranteeing rights to a tribe or tribal members" unless it provides compensation under the Fifth Amendment takings clause. Tribe, supra, at 1474, n.42, citing Hodel v. Irving, 481 U.S. 704 (1989); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 & n.9 (1955). Where a treaty between the United States and a tribe sets lands apart for the undisturbed use of a tribe,

> [federal] power does not extend so far as to enable the Government "to give the tribal lands to others or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation'" [citations omitted].

Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937).

Whether these rules, or different rules grounded in the Tenth Amendment and the Constitutional scheme, apply to a

Congressionally approved compact between sovereign States and tribes appears to be unsettled. It is highly unlikely, however, that the constitutional scheme tolerates unilateral federal abrogation of contracts between sovereign States and sovereign tribes. Congress is generally subject to limitations upon its power to curtail state authority, based upon the constitutionally recognized sovereignty of the States.[9/] It is a serious constitutional issue whether Congress may approve implementation of a settlement agreement between two sovereigns, only to change the terms materially by depriving the states of their bargained-for authority as few as 14 months after approval.

It has been argued that IGRA presents no Tenth Amendment problem because the State may simply decline to negotiate and allow the matter to be decided by a mediator or the Secretary of Interior. Yavapai-Prescott Indian Tribe v. State of Arizona, 796 F. Supp. 1292, 1297 (D.Ariz. 1992), appeal pending, 9th Cir. No. 92-16213; Cheyenne River Sioux v. South Dakota, CIV 91-3009, slip op. at 9 (D.S.D. Jan. 8, 1993), appeal pending

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9/ See Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869)(state taxing power); Coyle v. Smith, 221 U.S. 559, 565 (1911)(Congress may not prescribe location of a state's capital); Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315 (1935)(conversion of quasi-public state savings and loan associations into federal associations contravenes the reserved powers of the states). See also Fry v. United States, 421 U.S. 542, 547, n.7 (1975)(the various provisions of the Constitution are to be construed harmoniously with the States' reserved powers).

(8th Cir.). This argument was recently rejected by one Court on the ground that IGRA is obviously not voluntary. See Confederated Tribes of the Colville Reservation v. State of Washington, No. CS-92-0426-WFN (E.D. Wash. June 4, 1993), slip op. at 3-4 (the Court "cannot simply choose to ignore the mandatory language which forces the State to take part in this regulatory scheme."), citing Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) (Tenth Amendment invalidates provisions of the Forest Resources Conservation and Shortage Relief Act that mandate action by the States and are not mere "precatory admonitions").

If compliance with IGRA's good faith negotiation provisions were truly voluntary, then the voluntary decision of the States and their Governors not to negotiate would be the end of the matter. There would be no controversy for the Court to adjudicate, no need for orders to negotiate and to mediate, and no reason to declare the rights of the tribe to negotiate with an unwilling partner. Cf. Gilligan v. Morgan, 413 U.S. 1 (1973)(complaint by students against Governor regarding deployment of the National Guard was not justiciable). The entire basis of the Court's jurisdiction in the first place is the existence of a case or controversy over a legal duty purportedly established by IGRA: whether, in Judge Pettine's words, "the State is obligated to enter into good faith negotiations with the Tribe after receiving [the Tribe's]

request". Slip op. at 7. If there is no such obligation, then the District Court's opinion is wrong on the merits. If a legal obligation to negotiate in good faith exists, then the tribe can hardly make the contradictory claim that negotiations are voluntary. Such a claim would make judicial judgments ordering negotiations nothing more than pieces of paper and therefore cannot be correct.

In short, the District Court's opinion raises serious Tenth Amendment questions. All aspects of the Tenth Amendment issue counsel in favor of Rhode Island's construction of the applicable statutes--a construction that avoids constitutional problems.

2. The District Court's Opinion Raises Serious Eleventh Amendment Issues.

A majority of the lower courts have held that Congress, in enacting IGRA, lacked the authority to abrogate the States' Eleventh Amendment sovereign immunity from suit.[10/] Even

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[10/] Sault Ste. Marie Tribe of Chippewa Indians v. State, 800 F.Supp. 1484, 1489-90 (W.D. Mich. 1992), appeal pending (6th Cir.). Spokane Tribe of Indians v. State of Washington, 790 F.Supp. 1057, 1060-61 (E.D. Wash. 1991), appeal pending (9th Cir.); Poarch Bank of Creek Indians v. State of Alabama, 776 F.Supp. 550, 559-62 (S.D. Ala. 1991), appeal pending (11th Cir.); Ponca Tribe of Oklahoma v. State of Oklahoma, No. 92-988-T, slip op. at 6-8 (W.D. Okla. Sept. 8, 1992), appeal pending (10th Cir.); Pueblo of Sandia v. State of New Mexico, No. 92-0613-JC, slip op. at 3 (D. New Mex. 1992), appeal pending, 10th Cir. No. 93-2018; Confederated Tribes of the Colville Reservation, supra, slip op. at 2. But see Kickapoo Tribe v. Kansas, 1993 W.L. 94814 (D. Kan. March 29, 1993), appeal pending (10th Cir.); Seminole Tribe of Florida v. State of Florida, 801 F.Supp. 655, 658-63 (S.D. Fla. 1992), appeal pending (11th Cir.); Yavapai-Prescott Indian Tribe v. State of
(Footnote continued on next page.)

assuming that IGRA contains the requisite clear statement of Congressional intent to abrogate the States' Eleventh Amendment Immunity, the majority view that Congress lacks power to do so is correct.

The key issue is whether the Indian Commerce Clause authorizes Congressional abrogation.[11/] So far, only the Interstate Commerce Clause and the Fourteenth Amendment have been held by the Supreme Court to authorize such Congressional abrogation. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989)(Interstate Commerce Clause); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)(Fourteenth Amendment). It is important, therefore, to examine the role of the Indian Commerce Clause in the Constitutional allocation of power between the Federal government, the Indian tribes and the States. For purposes of Eleventh Amendment abrogation analysis, the question is whether the Indian Commerce Clause not only grants power to Congress, but also directly limits State authority.

(Footnote continued from previous page.)
Ariz., 796 F.Supp. 1292 (D. Ariz. 1992), appeal pending (9th Cir.); Cheyenne River Sioux, supra.

11/ Since there is no plausible argument that Massachusetts waived its Eleventh Amendment rights clearly and unequivocally, see Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40 (1985), the issue of waiver is not presented here.

The Supreme Court has contrasted the Commerce Clause and the Indian Commerce Clause on several grounds:

> It is . . . well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation [citation omitted], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs [citation omitted]. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. Most notably . . . [it is] inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdiction to trade "with" Indian tribes.

Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989), quoted in Spokane, supra, 790 F.Supp. at 1060-61.

These principles demonstrate that Commerce Clause jurisprudence cannot automatically be transferred to Indian Commerce Clause cases. It is therefore necessary to analyze the basis for the Union Gas and Fitzpatrick cases, and then determine whether the same rationale applies to this case.

In holding that Congress had power to abrogate Eleventh Amendment immunity under the Commerce Clause, the Union Gas plurality relied heavily upon the mutual assent of the States to have their power limited under that clause. 491 U.S. at 19-20. Similarly, in Fitzpatrick, the Court referred to the Fourteenth Amendment as "a Constitutional Amendment whose . . . sections by

their own terms embody limitations on state authority". 427 U.S. at 456.

Blatchford, supra, makes clear that the States never consented to such limitations under the Indian Commerce Clause:

> [T]here is no compelling evidence that the Founders thought such a surrender [of sovereign immunity] inherent in the constitutional compact.
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> * * *
>
> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citations omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S.Ct. at 2582-83. Thus, Blatchford not only held that the Eleventh Amendment applies to suits by Tribes against States, but also observed that the States did not consent to the surrender of sovereign immunity in the Indian Commerce Clause. As the Court stated, consent to Congressional abrogation of Eleventh Amendment immunity under the Indian Commerce Clause would be absurd, since there is no mutuality, where tribes were not parties to the U.S. Constitution.12/

12/ Contrary to the suggestion in Kickapoo, supra, 1993 WL 94814 at *4, this argument in no way requires disparagement of Union Gas. Rather, it is an application of the very principles followed in Union Gas. Moreover, if Congress' power to abrogate Eleventh Amendment immunity were plenary, it would hardly have been necessary for the Union Gas plurality to discuss the history and context of the Commerce Clause.

The Blatchford Court did not refer to a sweeping Congressional power of abrogation, but only referred to such power "where it exists". Id., 111 S.Ct at 2584. Blatchford's rationale demonstrates that Congress lacks the power to abrogate Eleventh Amendment immunity under the Indian Commerce Clause. In short, the District Court's application of IGRA to issue a federal judicial order compelling an unwilling state to negotiation in good faith raises serious Eleventh Amendment issues, which must be avoided, if possible.13/

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed and remanded with instructions to dismiss the

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13/ These issues could not be avoided by suing under the theory of Ex Parte Young, 209 U.S. 123, 158-59 (1908), because that doctrine only applies where the relevant duty is ministerial, not discretionary. "A court order to negotiate in good faith and conclude a tribal-state compact with the [tribe] clearly would infringe on executive discretion and fall outside the parameters of Ex Parte Young. Poarch Band of Creek Indians, 784 F.Supp at 1549, 1551-52 (S.D. Ala. 1992)." Ponca Tribe, supra, slip op. at 9. But see Spokane Tribe of Indians v. Washington, 790 F.Supp. 1057 (E.D. Wash. 1991); Cheyenne River Sioux Tribe, supra, slip op. at 5-6.

case for lack of jurisdiction or to enter Judgment declaring that Rhode Island has no obligation to negotiate with the tribe.

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WPPDW2/405

Summary of Applicable Compact Clause Cases

- **Virginia v. West Virginia,** 78 U.S. 39 (Wall.) (1870). Consent of Congress is generally required and compact approval by Congress is law of the United States. Both the statute and action leading to consent will evince congressional consent. See also, **Green v. Biddle**, 8 Wheat 1 (1823). See above.

- **Virginia v. Tennessee**, 148 U.S. 503(1893). Congress may consent to an interstate compact by authorizing state action in advance or by giving express or implied approval to an agreement the state have already joined. Looking at the terms compact or agreement the Court found that the prohibition in Article I, § 10, cl. 3 is directed to the formation of partnerships or "combinations" tending to increase the power of the states which might encroach upon or interfere with the "just supremacy" of the United States. And congressional consent is not "slavishly required" for each and every agreement between states.

- **West Virginia ex re Dyer v. Sims**, 341 U.S. 22 (1951). Many of the cases below refer to this case and repeat its findings. Although it should be noted that J. Frankfurter in *Petty, see infra,* vehemently disagreed with subsequent Courts interpretation of the *Dyer v. Sims* holding. Here the Court found that a compact accorded congressional consent "is more than a supple device for dealing with interests confined within a region ... It is also a means of safeguarding the national interest." See id. at 27. Thus, can be analogized to the Maine Settlement as Congress knew how to protect national interests -- in the field of Indian affairs -- as Compacts were a regular occurrence in American politics between sovereigns. Creating and ratifying a compact between the state and a tribe resolves a dispute pursuant to the means the founders prescribed disputes between sovereigns to be resolved and protects the national interest in protecting the Unions authority over Indian affairs. See id.

  [J. Reed, *concurring*]. Agrees with the outcome but "disagrees with the assertion of power by [the] court to interpret the meaning of the West Virginia Constitution." See id. at 33. J. Reed provides explanation and states, "under the Compact Clause ... the federal questions are the execution, validity and meaning of federally approved state compacts. The interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause and not by any implied federal power to construe state law." See id. at 34. *referring to* Rhode Island v. Massachusetts, 12 Pet. 657.

- **Cuyler v. Adams**, 449 U.S. 433 (1981).[Brennan, J.] Federal Courts have subject matter jurisdiction as congressional consent transforms "interstate compact within the Compact clause into a law of the United States, ... the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question." See id. at 438. The "requirement of congressional consent is at the heart of the compact clause." See id. at 439. This case first determined whether the interstate detainer agreement was a compact under Art. I, §10, cl. 3. Which it was so jurisdiction was found here. The form of consent is left to the discretion of Congress. See id. at 441 & FN 9.

Carchman v. Nash, 473 U.S. 716 (1985). [Blackmun, J.]. Compacts are federal law subject to federal construction. Examine the compact agreement by considering the "language of the

agreement." Id. at 724.

- ***Petty v. Tennessee-Missouri Bridge Commission***, 359 U.S. 275 (1959).

  The meaning of a compact is a question on which the Supreme Court has final say. See id. at 278 citing Dyer v. Sims at 28 (1951). This is true the Court continues, "even though the matter in dispute concerns a question of state law on which the courts or other agencies of the State have spoken. While we show deference to state law in construing a compact, state law as pronounced in prior adjudication and rulings is not binding." See id. at 279, FN 4. [Emphasis supplied].

  [Frankfurter, J dissenting]. Questioning the majority's construction of Dyer v. Sims. The dissent touches upon some interesting arguments concerning the purpose of the compact clause and consent of Congress. Compare Confederated Tribe of Siletz (9th Cir 1998).

- ***Alabama v. Bozeman**, 121 S. Ct. 2079 (2001). [Latest in the series of the interstate detainer compact cases, J. Breyer wrote for a unanimous Court]. The case interprets a specific provision of the Detainer Compact. Thus, a congressional approved interstate compact under Art. 1 §10, cl. 3 is federal law subject to federal construction. The Court focuses on the "literal language of the agreement." See id. at 2084. This case provides indication that the current nine justices have reached a consensus, at least in these compact circumstances, of how these agreements will be interpreted.*

- ***New York v. Hill**, 528 U.S. 110. (2000). {Another interstate detainer compact case.] [J. Scalia]. Congressionally sanctioned interstate compacts within the compact clause are federal law and subject to federal construction. The subject of the case was not covered in the detainer compact's provisions. Scalia therefore looks to "a broad array of constitutional and statutory provisions" that allow the unanimous Court to make its determination.*

- **Hess v. Port Authority Trans-Hudson Corp,** 513 U.S. 30, 40-42 (1994). finds that compact entities are the "creation of discrete sovereigns:" states and federal government. Cities and counties do not create compacts.

  [It can be forcefully argued that Tribes are also "constituent elements of the Union" and are "discrete sovereigns."]

- **Entergy Arkansas, Inc. v. Nebraska,** 68 F. Supp. 2d 1093 (D. Neb. 1999). "Good faith" provision imposed by interstate compact dealing with the disposal of low-level nuclear waste. Primary focus of the case on 11th Amendment as related to compact's provisions concerning the compact entities bringing or being sued.

  The Constitution provides two methods of resolving disputes between states. *See Petty v. Tennessee-Missouri Bridge Comm'n* (1) original jurisdiction conferred upon the Supreme Court to resolve disputes between the states under Art. III, §2. However, the Supreme Court in *dicta* has encouraged states to resolve disputes through the second method. See Virginia v. Tennessee (18__). Second Art. I, §10, cl. 3. The court recounts the "obscure history" of the compact clause. The court examines Frankfurter and Landis' 1925 Yale Law Journal article, the federalist papers, and British case law to conclude that the consent of the Union as a

whole was a republican transformation of the required consent of the Crown thus the "framers astutely created a mechanism of legal control of the states." See id. at 1098 *quoting* Frankfurter & Landis, 34 Yale L.J. at 695.

Precedent supports Congress' plenary power to attach enforcement conditions to compacts and the eleventh amendment does not so limit Congress' power. See id. at 1098, 1099. The court reminds us that compact clause cases are "fundamentally different," in the words of Justice Scalia, because congressional approval of compacts under the constitution is a "gratuity." See id. at 1099 *citing* College Savings Bank, 527 U.S. 666 (1999). When states enter a field in which they are barred states do not enjoy eleventh amendment immunity as at the founding the state accepted the controls placed upon them by Congress under the Constitution. See id. at 1099.

A compact is a voluntary contract between states, and if "approved by Congress, it also become federal law." See id. at 1100 *citing* Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Comm'n, 1999 WL 615506.

And although "cognizant that the state's sovereign powers are potentially limited by a Compact ... a compact is a 'legal document that must be construed and applied in accordance with its terms.'" See id. at 1100 *quoting* Texas v. New Mexico, 482 U.S. at 128. Good case well worth reading several times.

- **Waterfront Commission of New York Harbor v. Construction and Marine Equipment Co.**, 928 F. Supp. 1388 (D NJ 1996). Congress ratified a 1953 compact between NY and NJ approving "all the compact's terms and provisions" *and* "the carrying out and effectuation of said compact and enactments in furtherance thereof." "...Congressional consent transforms ... into a law of the United States, ... the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."

  Congressional consent is needed when "any agreement tend[s] to increase the political power of the states while encroaching on the supremacy of the United States. See id. at 1402. The Maine Settlement Act clearly tends to increase the political power of Maine in relationship to other states vis-à-vis Indian law.

- ***Pennsylvania v. The Wheeling & Belmont Bridge Co.**, 54 U.S. (13 How.) 518 (1852).[See also, Pennsylvania v. The Wheeling & Belmont Bridge Co, 59 U.S. (18 How.) 421 (1855).] A compact sanctioned by Congress becomes "law of the Union." Identified in Cuyler as the "law of the Union doctrine." See Cuyler at 437 FN 7.*

- **New York State Dairy Food, Inc. v. Northeast Dairy Compact Commission**, No. 98-2370 (1st Cir. 1999). To show congressional consent to a compact, consent must be expressly stated or "unmistakably clear" and the court will look to the statute or legislative history as evidence of congressional consent to alter the limits of state power otherwise imposed by the Constitution.

- **Pelt v. Utah**, Congress imposed a condition on a compact between the United States and the state of Utah requiring Utah to administer royalties from oil and gas and put money toward Indian educational programs.

- **New Jersey v. New York**, 523 U.S. 767 (____), *citing Cuyler* and *Texas v. New Mexico*. The Compact Clause, U.S. Const. art. I, § 10, cl. 3, provides that no state shall, without the consent of Congress, enter into any agreement or compact with another state. "Once a compact between states has been approved, it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested ... congressional consent transforms an interstate compact within the Compact Clause into a law of the United States. Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact *is interpreting* the compact. Unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." As a congressionally sanctioned interstate compact within the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, the Interstate Agreement on Detainers is a federal law subject to federal construction. New York v. Hill, 528 U.S. 110

- **In re Manuel P.,** 263 Cal Rptr 447, *review denied, cert. denied,* S.P. v. California, 498 U.S. 832 (Cal. App. 1989). Indicia of the existence of a compact within the meaning of the US Constitution compact clause include existence of joint organization or body involved in regulation of two governments, prohibition on either government terminating its participation unilaterally, and reciprocal enforcement of sentences or orders. The measure of compact within the meaning of the US Constitution requiring the consent of Congress under Art. 1, § 10, cl. 3, is the formation of any combination tending to increase political power of the states. See also, Duncan v. Smith, 262 S.W. 2d 373 (Ky. 1953).

  [The Maine Tribal State Commission created by the MIA fits this criteria]

- **League to Save Lake Tahoe v. Tahoe Regional Planning Agency**, 507 F.2d 517 (9th Cir. 1974). [Jurisdiction of Federal Courts]. CA & NV compact control development "to protect natural resources and ecological balance." Interestingly, this compact contained congressionally imposed conditions upon approval but were not contested in this case. The compact created a regional planning agency, TRPA. TRPA was required under the compact to do a number of things and the League sued alleging TRPA failed to comply with the legal requirements of the compact. The single question on appeal was whether federal courts have original jurisdiction under 28 USC §1331. The court finds that congressional consent transforms the Compact into the law of the United States, in turn, establishing federal jurisdiction. See id. at 519, 520. Moreover, the court reviewed the Supreme Court's authority on compacts citing *Dyer v. Sims* and Delaware River Com'n v. Colburn, 310 U.S. 419 (1940) (holding "the construction of such compact sanctioned by Congress by virtue of Article I, §10, cl. 3 of the Constitution, involves a federal 'title right, privilege or immunity, when specifically set up and claimed' in a state court may be reviewed on *certiorari.*")See id. at 520.

- **Mescalero Apache Tribe v. New Mexico,** __ F 3d ___ (10th Cir. 1997). Tribes entered a compact with the state. One of the main questions asked in this case was whether intervening changes in New Mexico state law affect the issues in the case. The state argued that for the Circuit Court to address the state law issues three questions must be certified concerning the change in New Mexico law to the New Mexico Supreme Court for state constitutional

interpretation. The court rejected this argument, as the issue was not presented before them on appeal. The District Court in this case ruled on seven substantive issues and the circuit court addressed five on appeal: indispensable party, applicability to *Seminole Tribe*, Tribal sovereign immunity, and political question doctrine. This case relied heavily on the reasoning of *Pueblo of Santa Ana* (10th Cir. 1996).

- **Pueblo of Santa Ana v. Kelly**, 104 F 3d 1546 (10th Cir) ***cert denied*** 118 S.Ct. 522 U.S. 807 (1997). Affirms the decision of the District Court [see below]. Agrees with the District Court analysis that IGRA imposes two separate issues of approval and validity. The District Court under *Dyer v. Sims* (1951) said it must independently review state law to determine whether the state was validly bound to a compact. (Interestingly the District Court. reached the same conclusion that the Supreme Court of New Mexico that the Governor lacked authority to sign the compact.) The circuit court choose not to determine whether they must independently evaluate state law or defer to the Supreme Court as they said, the outcome would not change the outcome of the case.

- **Pueblo of Santa Ana v. Kelly,** 932 F. Supp 1284 (D.NM 1996). [Discusses history of IGRA]. Compact entered into by tribes is invalid or ineffective under IGRA when the Governor lacks authority to sign compacts on behalf of the state. There is a fundamental separation under IGRA between the *approval* of the Secretary AND a *valid* tribal-state compact. Thus, approval might be granted but the compact might be invalid. *Compare Kickapoo Tribe of Indians v. Babbitt* (1993). The separation is clearly in the intent of Congress, because doing so maintains the principles of federalism thus allowing the state to enter into contracts on its own terms while maintaining its sovereignty with little intrusion; and preserving the federal government's role by approving the compact is only to ensure the integrity of the just supremacy of the United States. Thus, IGRA provisions carefully spell-out when the Secretary may reject a compact. See 25 USC §2710. Thus, the court here states, "to find that Secretarial approval [i.e. United States] somehow overrides a compacts requirements or provisions would frustrate an important purpose [balancing federal-state interests] of the Act. See id. at 1293 *citing* S. Rep. No. 100-446 (1988). Congress did not intend *approval* to "override deficiencies in the compact under state law." See id. Thus, the Secretary's "approval cannot itself validate an otherwise invalid compact." See id. at 1293. The validity of gaming compacts says the circuit court "presents a federal question." *Citing Dyer v. Sims*. "Interstate compact cases such as *Dyer* are analogous to the extent they hold that dispute arising under compact present a question of federal law." See id. at 1294. *Compare Kickapoo Tribe v. Babbitt* (DDC 1995).

- **Confederated Tribes of Chehalis v. Johnson,** 135 Wn. 2d 734 (Wash. 1998). [Access to Records Case]. "Tribal-State gaming compacts are agreements, not legislation, and are interpreted as contracts. See id. at 11, 12 *citing Confederated Tribes of Siletz v. Oregon* (9th Cir. 1998). The court finds a duty of itself to declare the meaning of what is written and not what is intended to be written when examining the compact provisions.

- **Confederated Tribe of Siletz v. Oregon**, 143 F.3d 481 (9th Cir. 1998). [Access to records case]. The compact is a result of a grant of federal authority through IGRA, which serves as bases for federal preemption. See id. at 484, 485. In the court's view the compact controls and calls for the application of state contract law, and in this light ambiguous terms must be enforced according to its terms. See id. at 485. The case also discusses generally, federal

preemption.

- **Salt River Pima-Maricopa Indian Community v. Hull**, 190 Ariz. 97 (Ariz. 1997). Governor's negotiation powers under IGRA. IGRA does not limit the legislative power of a state to negotiate tribal-state compacts in the manner of the state's choice. Thus, state law is not pre-empted by IGRA as it imposes no powers or privileges on the governor; IGRA only requires that the "state shall negotiate." In this case the state law required the consideration of an approved referendum of the people of Arizona requiring the governor to sign standard form compacts. *Compare Santa Ana* (above).

- **United States v. Santee Sioux Tribe of Nebraska**, 135 F.3d 558 (8th 1998). Tribe and state failed to enter compact. The Tribe opened a Class III gaming facility anyway. Tribe sued to compel the state to negotiate in "good faith" The *Seminole Tribe* decision intervened, providing bases for the district court to dismiss the suit. The state sought injunctive relief to halt gaming operations and subsequently the Chairman of NIGC granted temporary injunctive relief ordering a halt to gaming. The District Court refused to enforce the injunction as it was not final agency action and subject to judicial review. The Circuit Court found that the district court was wrong for failing to enforce NIGC order based on its analysis of the IGRA. The case also interprets IGRA and NE state law as to the meaning of class III gaming. The court finds that "all state laws" are applicable in Indian country under 18 USC §1166(a) to enforce gaming includes injunctive relief as IGRA incorporates the provision that "all state laws pertaining to the licensing, regulation, or prohibition of gambling ... in the same manner and to the same extent as such laws apply elsewhere in the state. See 18 USC §1166(a). IGRA does not distinguish between statutory and case law.

- **Kickapoo Tribe of Indians v. Babbitt**, 827 F. Supp. 37 (D.D.C. 1993).). [Related to Kansas v. Finney, 251 Kan. 559 (Kan. 1992).] Governor negotiated and signed a Tribal-State Compact with the tribe under IGRA provisions without legislative approval. The signed document was forwarded to the Secretary of Interior for approval pursuant to 25 USC §2710. While pending at Interior, other intervening circumstances ensued, including Kansas' Attorney General suit brought against the Governor for lacking the authority to bind the state. See Kansas v. Finney, 251 Kan. 559 (Kan. 1992). Kickapoo Tribe sued Interior to challenge the agency decision. The court finds that pursuant to §2710(d), IGRA gives the Secretary authority to approve Tribal-State Compacts and must do so within statutory constructs and regardless of whether the Kansas Governor had authority to bind the state -- an issue not within the Secretary's bailiwick--the Secretary was required to approve or disapprove the compact.

  In addition, the court explored whether the tribe and Kansas actually entered into a compact. Citing *Dyer v. Sims* (1951) (Validity of interstate compact which violated WV constitution a federal question.), the court found that the determination of the validity of a Tribal-State Compact, signed by the Governor apparently without authority under the Kansas constitution, is a federal question. Thus, "it is for the federal court to determine whether the Governor's approval of the Tribal-State compact is sufficient for purposes of IGRA." *See id.* The court finds that the state never entered into an agreement with the tribe accepting the determination of the Supreme Court of Kansas. These three cases together are complex.
- **Kickapoo Tribe of Indians v. Babbitt**, 310 U.S. App. D.C. 66 (D.C. App. 1995). Kansas entered into Tribal-State Compact purported under 25 USC §§ 2701-2721 (1988) negotiated

between the tribe and the Governor. The Kansas attorney general sued the Governor and the Kansas Supreme Court found that the Governor exceeded her constitutional authority as she was acting as the legislature and could not bind the state. See Kansas v. Finney, 251 Kan. 559 (Kan. 1992). In this case the tribe sued the Department of Interior for failing to follow IGRA's 45-day approval procedure during the Kansas legislative dispute and that the Tribal-State compact became valid as a matter of law and sued because the state of Kansas was not attached as an indispensable party under FRCP 19.

- **New York v. Oneida Indian Nation**, 90 F.3d 58 (2nd Cir. 1996). [See subsequent District Court case, 78 F. Supp. 2d 49 (N.D. N.Y. 1999)]. The circuit court case considers amending the compact once in operation. Interpretation of the provisions of the compact should follow the "cardinal principles of contract construction that all provisions of a contract should be given effect if possible."

- **New York v. Oneida Indian Nation**, 78 F. Supp. 2d 49 (NDNY 1999). Case examines the effect of *Seminole Tribe* on IGRA. Also, the court accepts the plain meaning approach to examining the provisions of compacts in general. For example, the court cites *Texas v. New Mexico* (1987) stating a "compact is akin to a contract." See Texas v. New Mexico, 482 U.S. 124 *quoting* Petty v. Tennessee-Missouri Brgd. Comm'n. (1959). Thus, "in interpreting the Compact, the court is guided by ordinary principles of contract interpretation.